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IN THE

Supreme Court of the United States

JAMES OBERGEFELL, ET AL.,

Petitioners,

v.

RICHARD HODGES, DIRECTOR,
OHIO DEPARTMENT OF HEALTH, ET AL.,

Respondents.

[Additional Case Captions Listed on Inside Front Cover]

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* PUBLIC AFFAIRS CAMPAIGN AND OPINION EXPERT FRANK SCHUBERT AND NATIONAL ORGANIZATION FOR MARRIAGE IN SUPPORT OF RESPONDENTS

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v.

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Respondents.

APRIL DEBOER, ET AL.,

Petitioners,

v.

RICK SNYDER, GOVERNOR OF MICHIGAN, ET AL.,

Respondents.

GREGORY BOURKE, ET AL.,

Petitioners,

v.

STEVE BESHEAR, GOVERNOR OF KENTUCKY, ET AL.,

Respondents.

QUESTIONS PRESENTED

1. Does the Fourteenth Amendment require a state to redefine marriage and license a marriage between two people of the same sex, contrary to express, recently reaffirmed vote of the people of the state?

2. Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex performed out of state, when doing so is contrary to the state's own fundamental policy decision?

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TABLE OF AUTHORITIES

Cases

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Baskin v. Bogan,
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Bostic v. Schaefer,
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City of Cleburne, Tex. v. Cleburne Living Ctr.,
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Collins v. City of Harker Heights, Tx.,
503 U.S. 115 (1992) 30

Doe v. Hodgson,
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Elk Grove Unified Sch. Dist. v. Newdow,
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Hicks v. Miranda,
422 U.S. 332 (1975) 4

In re Burrus,
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Keevan v. Smith,
100 F.3d 644 (8th Cir. 1996) 32

Kitchen v. Hebert,
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Latta v. Otter,
771 F.3d 456 (9th Cir. 2014), *petitions for cert. filed*, Nos. 14-765, 14-788 (Dec. 30, 2014; Jan. 2, 2015)..... 4, 31

Lawrence v. Texas,
539 U.S. 558 (2003) 15

M'Culloch v. Maryland,
17 U.S. (4 Wheat.) 316 (1819) 8

Meltzer v. C. Buck LeCraw & Co.,
402 U.S. 936 (1971) 33

Moore v. East Cleveland,
431 U.S. 494 (1977) 30

Plyler v. Doe,
457 U.S. 202 (1982) 32

Reno v. Flores,
507 U.S. 292 (1993) 30

Robicheaux v. Caldwell,
No. 13-5090 (E.D. La., September 3, 2014) 4

Rodriguez de Quijas v. Shearson/Am. Express, Inc.,
490 U.S. 477 (1989) 4

Roe v. Wade,
410 U.S. 113 (1973) 6, 7, 11

Schuette v. Coalition to Defend Affirmative Action,
134 S. Ct. 1623 (2014) 10, 28, 37

Snyder v. Massachusetts,
291 U.S. 97 (1934) 30

Sosna v. Iowa,
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Strauss v. Horton,
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United States v. Windsor,
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Washington v. Glucksberg,
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Wolf v. Walker,
986 F.Supp.2d 982 (W.D. Wis.) 5

Statutes and Constitutional Provisions

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Ak. Const. Art. 1, § 25 (1998) 3

Ala. Const. Art. I, § 36.03 (2006) 2

Ark. Const. Amend. 83, § 1 (2004) 3

Az. Const. Art. 30, § 1 (2008) 3

Cal. Const. Art. I, § 7.5 (2008) 3

Colo. Const. Art. 2, § 31 (2006) 3

Fla. Const. Art. 1, § 27 (2008) 3

Ga. Const. Art. 1, § 4 (2004) 3

Haw. Const. Art. 1, § 23 (1998) 3

Id. Const. Art. III, § 28 (2006) 3

Kan. Const. Art. 15, § 16 (2005) 3

Ky. Const. § 233A (2004) 3

La. Const. Art. 12, § 15 (2004) 3

Mich. Const. Art. 1, § 25 (2004) 3

Miss. Const. Art. 14, § 263A (2004) 3

Mo. Const. Art. 1, § 33 (2004) 3

Mont. Const. Art. 13, § 7 (2004) 3

N.C. Const. art. XIV, § 6 (2012) 3

N.D. Const. Art. 11, § 28 (2004) 3

Neb. Const. Art. I, § 29 (2000) 3

Nev. Const. Art. 1, § 21 (2000 and 2002) 3

Ohio Const. Art. XV, § 11 (2004) 3

Okla. Const. Art. 2, § 35 (2004) 3

Ore. Const. Art. XV, § 5a (2004) 3

S.C. Const. Art. XVII, § 15 (2006) 3

S.D. Const. Art. 21, § 9 (2006) 3

Tenn. Const. Art. 11, § 18 (2006) 3

Tex. Const. Art. 1, § 32 (2005) 3

Utah Const. Art. 1, § 29 (2004) 3

Va. Const. Art. 1, § 15-A (2006) 3

Wisc. Const. Art. 13, § 13 (2006) 3

Other Authorities

"Acquiescence Bias," Psychlopedia 14

Austin Institute, "Relationships in America Survey" (2014) 24

Baptist Press, "Poll: 60% of voters back traditional marriage" (Nov. 13, 2012) 19

Beam, Christopher, "Lies, Damn Lies, and Votes for Obama," Why do so many people say they voted for the president when they didn't?" Slate (June 18, 2009) 17

Billups, Andrea, "New Study: Polls Understate Opposition to Same-Sex Marriage," Newsmax (Sept. 30, 2013) 17

Brooks, David, *Roe's Birth, and Death*, N.Y. Times, at A23 (Apr. 21, 2005) 7

Cherlin, Andrew J., *The Deinstitutionalization of American Marriage*, 66 J. Marriage & Fam. 848 (2004)..... 34

Code of Conduct for United States Judges, Canon 3(A)(6) 12

Colwell, Taylor, "New Study Finds Media Bias in Gay Marriage Coverage," Townhall.com (June 17, 2013)..... 27

Emerson, Michael O., and Essenburg, Laura J., "What is Marriage? Americans Dividing" (Kinder Institute for Urban Research, Rice University, June 24, 2013)..... 22

Eskridge, William N. Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 Yale L.J. 1279 (2005)... 8

Eskridge, William N., Jr. & Spedale, Darren R., Gay Marriage: For Better or for Worse? What We've Learned from the Evidence 19 (2006)..... 33

Gallup News Service, "Gallup Poll Social Series: Consumption Habits -- Final Topline (July 10-14, 2013)..... 15, 16

Graff, E. J., Retying the Knott, The Nation at 12 (June 24, 1996) 34

Hesse, Monica, "Opposing Gay Unions With Sanity and a Smile," Washington Post, C01 (Aug. 28, 2009)..... 2

Hitlin, Paul, *et al.*, "News Coverage Conveys Strong Momentum for Same-Sex Marriage," Pew Research Center (June 17, 2013) 27

Human Rights Campaign, "Marriage in the Courts" 11

Hunter, Nan, "Polls consistently overestimate voter support for marriage equality," The Bilerico Project (June 16, 2010) 18

McCarthy, Justin, "Same-Sex Marriage Support Reaches New High at 55%," Gallup (May 21, 2014) 14, 24

NBC News, "At 59% Support for Same-Sex Marriage Hits New High" (March 9, 2015) 25

NBC News/Wall Street Journal Survey, Study #15110 (March 2015) 25

Nederhof, A., "Methods of coping with social desirability bias: a review," 15 European J. of Soc. Psych. 263-280 (1985) 17

Pew Research Center for The People and The Press (August 20-24, 2014) 20

PollingReport.com, "CNN/ORC Poll, Feb. 12-15, 2015" (Feb. 2015) 26

Posner, Richard A., "Should There Be Homosexual Marriage? And If So, Who Should Decide?" 95 Mich. L. Rev. 1578 (1997) 32

Rasmussen Reports, "Jury's Still Out on Gay Marriage" (Feb. 26, 2015) 20

Raum, Brian, "Married to marriage: 62% of Americans say it's one man, one woman, nothing else" (June 16, 2011) 19

Regnerus, Mark, "Right Side of History, or Primed to Say Yes?" National Review Online (August 20, 2013) 16

Schubert, Frank, "Campaign Spending on Same-Sex Marriage Ballot Measures" (March 31, 2015) 9

Schubert, Frank, "Compilation of Statewide Votes on Marriage, 1998-2012 (March 31, 2015) 9

Stohr, Greg, and Winkler, Matthew A., "Ruth Bader Ginsburg Thinks Americans Are Ready for Gay Marriage," Bloomberg (Feb. 12, 2015) 11

Suggestion for Recusal of Justice Scalia, *Newdow v. United States*, No. 03-7 (S. Ct. Sept. 5, 2003)..... 12

Sunstein, Cass, *Three Civil Rights Fallacies*, 79 Calif. L. Rev. 751 (1991) 7

Swanson, Emily, and McCombs, Brady, "AP-GfK Poll: Support of gay marriage comes with caveats" (February 5, 2015) 23

The AP-GfK Poll (Jan. 2015) 23

Tulving, Endel; Schacter, Daniel L.; and Stark, Heather A., "Priming Effects in Word Fragment Completion are independent of Recognition Memory," Journal of Experimental Psychology: Learning, Memory and Cognition (1982) 15

Willis, Ellen, *"Can Marriage Be Saved? A Forum*, The Nation at 16-17 (June 24, 1996) 34

WPA Opinion Research, "Polling Memorandum" (Feb. 20, 2015) 19, 20

INTEREST OF AMICI CURIAE[1]

Frank Schubert is a nationally acclaimed public affairs professional who has twice been named the nation's top public affairs consultant by the American Association of Political Consultants. He has managed numerous state ballot initiative campaigns relating to the definition of marriage, including in the states of California (Proposition 8), Maine (Question 1, 2009 and Question 1, 2012), North Carolina (Amendment 1, 2012), Maryland (Question 6, 2012), Minnesota (Amendment 1, 2012) and Washington (Referendum 74). He also serves as a consultant to the National Organization for Marriage. Schubert has directed, reviewed or overseen countless surveys at the state and national levels and is an expert in understanding public opinion relating to the definition of marriage.

The National Organization for Marriage ("NOM") is a nationwide, non-profit organization with a mission to protect marriage and the faith communities that sustain it. Since its founding in 2007, NOM has spent more than eight million dollars in campaign efforts to preserve the traditional definition of marriage. The Washington Post has described NOM as "the preeminent organization dedicated" to preserving the definition of marriage as the union of a husband and wife. Monica Hesse, "Opposing Gay Unions

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[1] Parties to these cases have consented to the filing of this brief and letters indicating their consent are on file with the Clerk. *Amici* state that no counsel representing a party in this Court authored this brief in whole or in part, and no person other than *amici* and their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

With Sanity and a Smile," Washington Post, at C01 (Aug. 28, 2009).

INTRODUCTION

Until quite recently, "marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization." *United States v. Windsor*, 133 S.Ct. 2675, 2689 (2013). This historical understanding is rooted in the very nature of men and women, whose biological complementarity allows the formation of unions that are uniquely capable of generating new human life. Crafted around that core purpose, the institution of marriage provides immense benefits to society, to parents, and particularly to the children that result from their union because it channels the consequences of procreative sexual activity toward ends that are beneficial rather than harmful to society.

A large majority of the States, and large majorities of the people in those States, continue to adhere to this historical, biologically-rooted definition of marriage, not out of some senseless devotion to antiquity but as the result of a considered policy judgment. Indeed, the long-standing view of marriage is viewed as such a core issue of public policy that a majority of the States have in the past two decades taken the step of constitutionalizing their definition of marriage to prevent experimentation in other states (mostly imposed by the courts), or by their own judges, from altering their own marriage policies. *See* Ala. Const. Art. I, §36.03 (adopted 2006); Ak. Const. Art. 1, §25 (1998); Az. Const. Art. 30, §1 (2008); Ark. Const. Amend. 83, §1 (2004); Cal. Const. Art. I, §7.5 (2008); Colo. Const.

Art. 2, §31 (2006); Fla. Const. Art. 1, §27 (2008); Ga. Const. Art. 1, §4 (2004); Haw. Const. Art. 1, §23 (1998); Id. Const. Art. III, §28 (2006); Kan. Const. Art. 15, §16 (2005); Ky. Const. §233A (2004); La. Const. Art. 12, §15 (2004); Mich. Const. Art. 1, §25 (2004); Miss. Const. Art. 14, §263A (2004); Mo. Const. Art. 1, §33 (2004); Mont. Const. Art. 13, §7 (2004); Neb. Const. Art. I, §29 (2000); Nev. Const. Art. 1. §21 (2000 and 2002); N.C. Const. art. XIV, §6 (2012); N.D. Const. Art. 11, §28 (2004); Ohio Const. Art. XV, §11 (2004); Okla. Const. Art. 2, §35 (2004); Ore. Const. Art. XV, §5a (2004); S.C. Const. Art. XVII, §15 (2006); S.D. Const. Art. 21, §9 (2006); Tenn. Const. Art. 11, §18 (2006); Tex. Const. Art. 1, §32 (2005); Utah Const. Art. 1, §29 (2004); Va. Const. Art. 1, §15-A (2006); Wisc. Const. Art. 13, §13 (2006).

When this Court invalidated Section 3 of the federal Defense of Marriage Act two terms ago in *Windsor*, it elaborated at length on the fact that, historically, States have been the primary determiners of marriage policy in this country. "'[R]egulation of domestic relations' is 'an area that has long been regarded as a virtually exclusive province of the States,'" this Court noted. *Windsor*, 133 S.Ct., at 2691 (2013) (quoting *Sosna v. Iowa*, 419 U.S. 393, 404 (1975)). Indeed, this Court recognized that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." *Id.* (quoting *In re Burrus*, 136 U.S. 586, 593–594 (1890)).

Despite this strong language, and in conflict with the decision of the Sixth Circuit below, four circuit

courts[2] believe they have found hidden between the lines of this Court's *Windsor* decision hints of a contrary view, one that not only renders unconstitutional those long-standing fundamental policy judgments of the States but that implicitly overrules this Court's forty-year-old summary disposition in *Baker v.* Nelson, 409 U.S. 810 (1972). *See, e.g., Kitchen*, 755 F.3d, at 1229 (asserting that its holding that there is a fundamental right to same-sex marriage, subjecting Utah's law to strict scrutiny, was derived "in large measure" from *Windsor*); *but see Robicheaux v. Caldwell*, No. 13-5090, Slip. Op. at 10 (E.D. La., September 3, 2014) (describing Plaintiffs' argument that *Windsor* required heightened scrutiny as "intellectual anarchy"). This, despite this Court's admonition that "the lower courts are bound by summary decisions by this Court 'until such time as [this] Court informs (them) that (they) are not.'" *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975) (quoting *Doe v. Hodgson*, 478 F.2d 537, 539 (2nd Cir. 1973)); *see also Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions").

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[2] *Latta v. Otter*, 771 F.3d 456, 467, 472-73 (9th Cir. 2014), *petitions for cert. filed*, Nos. 14-765, 14-788 (Dec. 30, 2014; Jan. 2, 2015); *Baskin v. Bogan*, 766 F.3d 648, 659 (7th Cir. 2014); *Bostic v. Schaefer*, 760 F.3d 352, 377 (4th Cir. 2014); *Kitchen v. Hebert*, 755 F.3d 1193, 1213-14 (10th Cir. 2014).

Some of the lower court decisions rejecting this Court's binding precedent have also been based (at least in part) on the view that "public opinion is moving quickly in the direction of support for same-sex marriage." *Wolf v. Walker*, 986 F.Supp.2d 982, 1027 (W.D. Wis.), *aff'd sub nom. Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014). Accordingly, this brief addresses that erroneous assumption. It does so with a recap of the significant efforts in the States over the last decade and a half to reaffirm and protect the long-standing, biologically-rooted definition of marriage and an expert analysis of the current state of public opinion on the subject of same-sex marriage, which demonstrates that a majority of Americans still adhere to the view that marriage is a union of one man and one woman. The brief concludes with a constitutional analysis that confirms this Court's holding in *Baker v. Nelson*, namely, that the Constitution does not remove this important policy decision from the people of the several States.

SUMMARY OF ARGUMENT

Petitioners ask this Court to find a constitutional right to marry persons of the same sex that exists nowhere in the text of the Constitution or in the history and traditions of the American people. Indeed, in the past decade and a half, over fifty million Americans in thirty-five States have voted against redefining the core institution of marriage to encompass same-sex relationships, a redefinition that would necessarily reposition the institution from one that is biologically rooted and child-centric to one that ignores the basic gender complementarity of human biology and is adult-centric. Although the political dispute sur-

rounding the issue of same-sex marriage is contentious, removing the issue from the people, as Petitioners' ask this Court to do, would likely be even more contentious. Such a decision would prevent the democratic processes from working out reasonable solutions to the competing positions and would involve this Court in a political quagmire not seen since *Roe v. Wade*.

Moreover, the notion advanced in some corridors that the American people have significantly altered their views on same-sex marriage in recent years to the point that large majorities now support a redefinition of marriage and therefore would readily accept a mandate from this Court imposing same-sex marriage on the nation is simply not true. Rather, the country remains strongly divided on the subject. Opposition to redefining marriage is both foundational and widespread. And like the opposition to abortion following this Court's decision in *Roe*, such opposition is likely to crystalize and intensify rather than fade away were this Court to discover in the Fourteenth Amendment a constitutional mandate for same-sex marriage in all fifty states.

Finally, even if public opinion on the subject of same-sex marriage had already changed (or may change in the future), that possibility merely proves the wisdom, recognized by Justice Kennedy's plurality opinion and Justice Breyer's concurrence in *Schuette*, that contentious issues such as this should be settled by the political process, not by this Court when there is nothing in the Constitution or this Court's precedents, much less an unambiguous constitutional command, to require such a result.

ARGUMENT

I. Petitioners Are Asking This Court to Intervene In a Heated Political and Policy Dispute, An Arena Where Judicial Authority Is At Its Lowest Ebb.

This Court is acutely aware of the dangers that flow from judicial interference in policy disputes, particularly hotly contested ones. One such attempt, a century and a half ago, led directly to the Civil War, the bloodiest war in our nation's history. Another has so polarized our nation's politics for almost a half-century now that respected commentators and legal scholars from across the ideological spectrum have noted the democracy-destructive consequences. The author of *Roe v. Wade*, 410 U.S. 113 (1973), "did more inadvertent damage to our democracy than any other 20th-century American," wrote David Brooks in the New York Times, for example. "When he and his Supreme Court colleagues issued the *Roe v. Wade* decision, they set off a cycle of political viciousness and counter-viciousness that has poisoned public life ever since." David Brooks, *Roe's Birth, and Death*, N.Y. Times, at A23 (Apr. 21, 2005).

On the other side of the political spectrum, Professor Cass Sunstein has noted that "the decision may well have created the Moral Majority, helped defeat the equal rights amendment, and undermined the women's movement by spurring opposition and demobilizing potential adherents." Cass Sunstein, *Three Civil Rights Fallacies*, 79 Calif. L. Rev. 751, 766 (1991). And Professor William Eskridge, a leading advocate for same-sex marriage, has written about the

political "distrust" that has arisen since the *Roe* decision because it "essentially declared a winner in one of the most difficult and divisive public law debates of American history" and allowed no recourse to the political process. William N. Eskridge, Jr., Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics, 114 Yale L.J. 1279, 1312 (2005).

Petitioners' claims threaten to drag this Court, and the country, into another such quagmire. If the Constitution's commands clearly so require, then it would be the "painful duty" of this Court to say so. *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819). But as described more fully in Part III below, the Constitution's text is silent on this issue. And absent such a clear command, if this Court were to accept Petitioners' arguments, a more apt description of the effect on the Court would be "self-inflicted wound."

There are powerful democratic forces at play on both sides of this policy dispute, demonstrating that the redefinition of marriage to encompass same-sex relations is by no means a settled question. Indeed, if anything, the election results of the past decade and a half demonstrate overwhelming support for retaining the long-standing, biologically-rooted definition of marriage.

In the decade and a half since the Hawaii Supreme Court first raised concerns that a redefinition of marriage might be judicially imposed in one State and then spread to other States, the issue of whether marriage should continue to be defined as between one man and one woman has been on statewide ballots

thirty-nine times, in thirty-five states (four states voted on the issue twice). In only three of those thirty-nine elections (Maine, Maryland, and Washington, all in 2012), less than eight percent of the total, did voters vote in favor of same-sex marriage.[3]

The number of *votes* cast in favor of retaining marriage as an institution rooted in the unique complementarity of men and women has also been lopsided. In those thirty-nine elections, during which nearly eighty-five million votes were cast in thirty-five states on the issue of same-sex marriage, more than fifty-one million votes were cast in favor of the man/woman definition of marriage, while only thirty-three million were cast against. *See* Frank Schubert, "Compilation of Statewide Votes on Marriage, 1998-2012 (March 31, 2015)" (depicting total votes in favor of man/woman marriage at 51,483,777, versus votes against at 33,015,412).[4] Collectively, that is a margin of 60.93% to 39.07%, *id.*, an overwhelming landslide in American politics.

That cumulative landslide in favor of traditional marriage is even more significant when one considers that same-sex marriage proponents cumulatively outspent defenders of traditional marriage by more than 35%, or $32 million. *See* Frank Schubert, "Campaign Spending on Same-Sex Marriage Ballot Measures" (April 1, 2015) (depicting $124,253,300 spent for the

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[3] In one additional state election—Minnesota in 2012—voters rejected constitutionalizing their state's long-standing man-woman definition of marriage, but did not affirmatively adopt same-sex marriage.

[4] Available at http://nationformarriage.org/uploads/resources/Compilation-of-Statewide-Votes-on-Marriage.pdf.

same-sex marriage position, $91,799,933 spent for the traditional marriage position, on state ballot measures from 1998 to 2012, excluding Alabama and Nevada, for which data was unavailable).[5] All told, over $216 million was spent on both sides of the campaigns, *id.*, making them among the most contentious and intense in American history. *Amicus* Frank Schubert, one of the nation's leading experts on ballot initiative campaigns, is aware of no other issue that has generated that level of campaign expenditure.

With that kind of intensity and contentiousness, there is little prospect that the controversy over same-sex marriage can be cabined by a decision from this Court invalidating, on anything less than clear constitutional command, the results of that political process. This is simply not going to be a case where judicial negation of democratically chosen policy is going to yield full and quiet acceptance of the judicially-imposed rule.

In short, unless there is a "persuasive basis in our Constitution or our jurisprudence to justify such a cataclysmic transformation of th[e] venerable institution" of marriage, *In re Marriage Cases*, 183 P.3d 384, 459 (Cal. 2008) (Baxter, J., concurring and dissenting)—and there clearly is not—this Court should not countermand the considered policy judgments of the people. *See Schuette v. Coalition to Defend Affirmative Action*, 134 S.Ct. 1623, 1637 (2014) (Kennedy, J., plurality opinion); *id.* at 1649-50 (Breyer, J., concurring).

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[5] Available at http://nationformarriage.org/uploads/resources/Campaign-Spending-on-Same-Sex-Marriage-Ballot-Measures.pdf

II. Recent National Surveys Show That The American People Remain Closely Divided Over Same-Sex Marriage.

Some may deny that removing this hotly contested issue from the political process will yield the kind of negative public reaction that followed on the heels of this Court's decision in *Roe v. Wade* and remains even to this day. Americans are "moving inexorably in the direction of supporting" same-sex marriage, they claim. Human Rights Campaign, "Marriage in the Courts."[6] This view was recently echoed by Justice Ginsburg in a February 11, 2015 interview with Bloomberg, stating: "The change in people's attitudes on that issue has been enormous." Greg Stohr and Matthew A. Winkler, "Ruth Bader Ginsburg Thinks Americans Are Ready for Gay Marriage," Bloomberg (Feb. 12, 2015).[7] "In recent years," she added, "people have said, 'This is the way I am.' And others looked around, and we discovered it's our next-door neighbor—we're very fond of them. Or it's our child's best friend, or even our child. I think that as more and more people came out and said that 'this is who I am,' the rest of us recognized that they are one of us." *Id.* Because of the perceived change in attitude, Justice Ginsburg expressed her belief that it is "doubtful that" a decision by "this Court, this year" holding that "there is a constitutional right for same-sex couples to

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[6] Available at http://americansformarriageequality.org/marriage-in-the-courts (last visited March 31, 2015, as are all websites cited herein).

[7] Available at http://www.bloomberg.com/news/articles/2015-02-12/ginsburg-says-u-s-ready-to-accept-ruling-approving-gay-marriage-i61z6gq2.

marry" "wouldn't be accepted" by the American people. *Id.*[8]

The notion that solid majorities of the American people have dramatically changed their views about the nature of marriage and now support a drastic redefinition of marriage is simply not true. Far from showing overwhelming public support for redefining marriage in genderless terms, recent surveys show that the public remains deeply divided on the issue. Some surveys show opposition to same-sex marriage outstripping public support for it; several surveys have shown the public's support for same-sex marriage dropping in recent months; others show that American voters continue to believe that marriage is only the union of one man and one woman; while still others show plurality support for same-sex marriage, but well below majority support and with continuing strong opposition.

To be sure, there have been some surveys purporting to show majority support for redefining marriage,

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[8] Justice Ginsburg's remarks call into question her impartiality in and constitute public comment about a case pending before her. We would be remiss not to suggest that recusal is therefore warranted. *See* 28 U.S.C. §455(a) ("Any justice ... shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned"); *cf.* Code of Conduct for United States Judges, Canon 3(A)(6) ("A judge should not make public comment on the merits of a matter pending or impending in any court"); *compare* Suggestion for Recusal of Justice Scalia, *Newdow v. United States*, No. 03-7 (S. Ct. Sept. 5, 2003) (contending that Justice Scalia's public comments on a case in the lower courts warranted his recusal once this Court granted certiorari in the case); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 18 (2004) ("Justice SCALIA took no part in the consideration or decision of this case").

but many of those suffer from methodological flaws. The one aspect of this contentious issue that draws consistently strong support is the proposition that the *courts* should not substitute their judgment for that of the democratic political process.

Drawing on the public opinion polling and campaign expertise of *amicus* Frank Schubert, this section describes the art of public opinion polling and its nuances and potential for methodological errors, then summarizes and analyzes the existing polling data on the same-sex marriage issue.

A. Several factors that influence public opinion polling generally counsel against the received wisdom that Americans now support redefining marriage.

Many people treat public opinion polling as if it were purely a scientific exercise, akin to measuring cholesterol or glucose in a blood test. But polling results reflect a myriad of subjective, judgment-based factors that can and do heavily influence those results. The audience surveyed, sampling methodologies, question order, question wording and other factors are critical elements that impact the outcome of any survey.

For instance, a survey of American adults age 18+ on a particular issue may yield different results than a survey of registered voters on that same issue. A survey of registered voters may yield different results on a particular issue depending on whether the sample was drawn from the voter file or participants were simply asked to self-report whether they were registered to vote. A survey of likely voters may yield dif-

ferent results on an issue than a survey of all registered voters. Thus, it is important in assessing public opinion polling to keep in mind the different audiences that any given poll is measuring.

Another critical factor in polling that influences results is question wording. This is especially true on the marriage issue. The dynamic of positive or "acquiescence" response bias[9] is an important factor in this regard. People generally want to be "for" something rather than "against" something. In almost all the public polling on marriage, the "for" position is in support of redefining marriage while the "against" position is associated with support for traditional, man-woman marriage. In surveys where the "for" position is associated with traditional marriage, a majority of respondents respond they are in support of that position.[10]

Another factor related to question wording is to associate particular results with a particular position. For instance, some polls ask respondents if they favor making marriage legal for same-sex couples so that they can have "the same rights as traditional marriages."[11] Such phraseology introduces a separate concept – rights – that makes analysis of a respondent's

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[9] "Acquiescence Bias," Psychlopedia, available at http://www.psych-it.com.au/Psychlopedia/article.asp?id=154.

[10] *See, e.g.*, WPA Opinion Research (February 2015); Rice University (2013); The Polling Company (September 2012), discussed *infra* at 18-23.

[11] *See, e.g.*, Justin McCarthy, "Same-Sex Marriage Support Reaches New High at 55%," Gallup (May 21, 2014) ("Gallup Survey"), available at http://www.gallup.com/poll/169640/sex-marriage-support-reaches-new-high.aspx.

position on marriage difficult to determine. A positive response to the question might show that they support same-sex marriage by itself, or it might be an indication that they wish same-sex couples to receive benefits.

Question order can also impact results. A question about marriage that follows questions on less controversial matters impacting same-sex couples can produce artificially high results on the marriage question. This dynamic is called "priming" and although the bias it introduces is well-known,[12] it is a practice employed by many pollsters on the same-sex marriage issue.

Indeed, one of the nation's most-recognized polling organizations, Gallup, has routinely utilized "priming" when asking people about same-sex marriage, which helps explain why Gallup consistently shows high support for same-sex marriage. Gallup "primes" its question on same-sex marriage by first asking whether respondents "think gay or lesbian relationships between consenting adults should or should not be legal." Gallup News Service, "Gallup Poll Social Series: Consumption Habits -- Final Topline, Question 50 (July 10-14, 2013).[13] Homosexual relationships between consenting adults have been legal in many states for decades and in every state since this Court's decision more than a decade ago in *Lawrence v. Texas*,

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[12] *See, e.g.*, Endel Tulving, Daniel L. Schacter, and Heather A. Stark, "Priming Effects in Word Fragment Completion are independent of Recognition Memory," Journal of Experimental Psychology: Learning, Memory and Cognition (1982).

[13] Available at http://www.afer.org/wp-content/uploads/2014/02/2013-0710-14-Gallup.pdf.

539 U.S. 558 (2003), and there is no effort at any level to revisit that decision. The question thus has no relevance to any current policy discussion. Its purpose, one can assume, and certainly its effect, is to predispose the answer to the next question: "Do you think marriages between same-sex couples should or should not be recognized by the law as valid, with the same rights as traditional marriages?" Gallup, Final Topline, Question 51. Having just told Gallup that gay relationships should be legal, some poll respondents will now be loathe to tell them that same-sex couples should not be able to marry and obtain "rights."

Significantly, a prominent sociologist examined Gallup's practice of priming its questions on same-sex marriage and found that the company did not always do this. *See* Mark Regnerus, "Right Side of History, or Primed to Say Yes?" National Review Online (August 20, 2013);[14] *see also* Gallup, Final Topline, Question 50 n. † (note indicating the primed question was only "Asked of a half sample"). When it varied its practice — priming on some surveys and not others — support for same-sex marriage varied. When Gallup did not prime, support for same-sex marriage totaled, on average, 6 to 7 percentage points less than when it did. *Id.* Gallup now primes on every survey related to same-sex marriage, *id.*, severely undermining the validity of its reported results.

Another factor that influences polling results on same-sex marriage is a dynamic called "social desira-

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[14] Available at http://www.nationalreview.com/article/356220/right-side-history-or-primed-say-yes-mark-regnerus.

bility bias." A. Nederhof, "Methods of coping with social desirability bias: a review," 15 European J. of Soc. Psych. 263-280 (1985). As a general matter, people do not wish to appear to take a position that runs counter to the perceived mood of the culture or that might make them look bad in the eyes of the interviewer. For example, surveys that ask respondents if they voted in the last election will yield results considerably higher than official participation data shows people to have actually voted. This is because some respondents do not wish to admit that they failed to exercise their duty to vote. *See, e.g.*, Christopher Beam, "Lies, Damn Lies, and Votes for Obama," Why do so many people say they voted for the president when they didn't?" Slate (June 18, 2009).[15]

This is an important factor on the issue of marriage, which has become one of the most contentious issues facing the country. In the case of same-sex marriage, the politically correct answer has become to say you favor it. *See, e.g.*, Andrea Billups, "New Study: Polls Understate Opposition to Same-Sex Marriage," Newsmax (Sept. 30, 2013).[16] This may help explain why polls in state ballot measure campaigns where traditional marriage amendments were on the ballot have consistently *underestimated* support for traditional marriage by 5 to 7 points compared to the actual results on election day. *See* Nan Hunter, "Polls

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[15] Available at http://www.slate.com/articles/news_and_politics/politics/2009/06/lies_damn_lies_and_votes_for_obama.html.

[16] Available at http://www.newsmax.com/Politics/gay-marriage-polls-bias/2013/09/30/id/528491/.

consistently overestimate voter support for marriage equality," The Bilerico Project (June 16, 2010).[17]

B. Recent polls demonstrate that the nation remains very divided over same-sex marriage.

With the above factors in mind, *Amicus* Frank Schubert has reviewed one dozen recent surveys on the marriage issue, which encompass the following categories:

- Polls showing majority support for traditional marriage;
- Polls showing a drop in support for same-sex marriage;
- Polls showing a plurality for one side or the other, but short of a majority opinion;
- Polls showing majority support for same-sex marriage.

We address each of these categories below.

1. Recent National Polls Show Majority Support For Traditional Marriage.

The firm of WPA Opinion Research conducted a nationwide survey of 800 randomly-selected voters in February 2015 for the Family Research Council. The results were publicly released at a conference of the National Religious Broadcasters Association. The survey asked respondents whether they agreed or disagreed with this statement: "I believe that marriage should be defined ONLY as a union between one man

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[17] Available at http://www.bilerico.com/2010/06/polls_consistently_overestimate_voter_support_for.php.

and one woman." 53% of voters surveyed said they agreed with the statement, while 43% disagreed. WPA Opinion Research, "Polling Memorandum," p. 1 (Feb. 20, 2015).[18]

This result is similar to other surveys conducted in recent times that ask a similar question. For instance, a post-election survey by The Polling Company conducted immediately following the 2012 election found that 60% of those who actually voted believe that marriage is only the union of one man and one woman. Baptist Press, "Poll: 60% of voters back traditional marriage" (Nov. 13, 2012).[19] Previously, a survey conducted by the firm of Public Opinion Strategies for the group Alliance Defending Freedom found that 62% of voters said they believed marriage is only the union of one man and one woman. Brian Raum, "Married to marriage: 62% of Americans say it's one man, one woman, nothing else" (June 16, 2011).[20]

On a related matter, the WPA Opinion Research survey also calls into question the accuracy of the widespread belief among America's political and cultural elite that the American people will accept a Supreme Court ruling redefining marriage. The firm found in February 2015 that 61% of registered voters agreed with this statement: "States and citizens should remain free to uphold marriage as the union of a man and a woman and the Supreme Court shouldn't

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[18] Available at http://downloads.frc.org/EF/EF15B71.pdf.

[19] Available at http://www.bpnews.net/39150.

[20] Available at http://www.adfmedia.org/News/PRDetail/4914.

force all 50 states to redefine marriage." WPA Opinion Research, "Polling Memorandum" (Feb. 20, 2015).[21]

2. Recent National Polls Show A Drop in Support for Same-Sex Marriage

Two recent national surveys have found that, contrary to the narrative advanced by many that same-sex marriage is "inevitable," support for same-sex marriage has recently *dropped*, not increased.

The firm of Rasmussen Reports reported in February 2015 that support for same-sex marriage among likely voters stood at 42%, while opposition stood at 44%. Rasmussen Reports, "Jury's Still Out on Gay Marriage" (Feb. 26, 2015).[22] Rasmussen stated, "Support for gay marriage has fallen to its lowest level in over a year," and noted that support had dropped by 6% since December 2014, "tying the low last reached in late 2013." *Id.*[23]

A similar phenomenon was found by Pew Research Center in their national survey released in September 2014. Pew Research Center, September 2014 Religion and Politics Survey, Final Topline, p. 3 (Sept. 2-9,

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[21] Available at http://downloads.frc.org/EF/EF15B71.pdf.

[22] Available at http://www.rasmussenreports.com/public_content/politics/general_politics/february_2015/jury_s_still_out_on_gay_marriage.

[23] The six percentage point magnitude of the drop is available behind the paywall for paid subscribers.

2014).[24] Pew found that support for same-sex marriage had dropped by five points in the preceding seven months, while opposition had increased by two points—a combined seven points change in the direction of traditional marriage. *Id.* This represented the largest shift in public opinion that Pew Research Center had found on this issue since 2006, and the second time in the past five years that Pew has shown support for the traditional marriage position gaining ground.[25]

The results of Pew and Rasmussen echo the findings of a unique study by Rice University published in 2013. The Rice University study relies on a longitudinal assessment of survey respondents over time, tracking responses to the statement, "the only legal marriage should be between one man and one woman." The survey looked at responses from the same respondents in both 2006 and 2012. The researchers found:

> The news of massive public opinion change has ... been exaggerated. In fact, we find that statistically, there has been no change in people's response to legal marriage being defined as one man and one woman. However, when we look behind the overall numbers, we find that many people did indeed change their minds over the 6-year period. The most stable category was

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[24] Available at http://www.pewforum.org/files/2014/09/Religion-and-Politics-14-09-22-topline.pdf.

[25] It should be noted that this shift in public opinion corresponds with the rash of federal court decisions invalidating state laws and constitutional amendments defining marriage as the union of one man and one woman.

> among Americans who agreed in 2006 that the only legal marriage should be between one man and one woman. About three-quarters (74%) who agreed with the statement in 2006 also agreed with it in 2012. Among those who disagreed with the statement in 2006, 61% also disagreed in 2012.

Michael O. Emerson and Laura J. Essenburg, "What is Marriage? Americans Dividing," p. 5 (Kinder Institute for Urban Research, Rice University, June 24, 2013).[26] The Rice University researchers went on to note:

> What is surprising in light of other polls and the dominant media reports that Americans are moving in droves from defining marriage as one man and one woman to an expanded definition is the movement of people in the other direction as well, a fact missed by surveys that do not follow the same people over time.... [W]e did find that 16% of people who agreed in 2006 that the only legal marriage should be between one man and one woman *disagreed* with that statement in 2012. But conversely, the survey found that over one-quarter (28%) of people who disagreed with the statement in 2006 agreed with the statement in 2012. So among those respondents agreeing or disagreeing in 2006, *more actually switched to agree than to disagree*.

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[26] Available at http://kinder.rice.edu/uploadedFiles/Kinder_Institute_for_Urban_Research/Publications/White_Papers/Marriage%20Definition%20White%20Paper.pdf.

Id., at 5-6 (emphasis in original).[27]

3. Some Recent National Polls Show a Plurality For One Side or The Other, But No Majority Opinion.

Several recent national surveys highlight the fact that public opinion on the issue of same-sex marriage remains closely divided. The Associated Press/GfK survey of 1,045 adults conducted between January 29 and February 2, 2015, found that 35% of American favor a law allowing same sex couples to legally marry, while 31% of Americans opposed such a law. The AP-GfK Poll, p. 2 (Jan. 2015).[28] 31% neither support nor oppose such a law. *Id.* Even after being pressed to choose one answer or the other, only 44% favored such a law while 39% opposed. *Id.*, at 3; Emily Swanson and Brady McCombs, "AP-GfK Poll: Support of gay marriage comes with caveats" (February 5, 2015).[29] The same survey found the country split right down the middle when whether this Court "should or should

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[27] The Rice study also revealed that, among those who had no opinion in 2006, 42% had moved into the "disagree" column while 23% had moved into the "agree" column. That does indicate some movement toward same-sex marriage among those previously undecided, but because of the small size of that group in 2006 (only 13% of the sample), that trend is dwarfed by the movement the other direction by those who previously favored same-sex marriage and now support marriage as only a union of one man and one woman.

[28] Available at http://ap-gfkpoll.com/main/wp-content/uploads/2015/02/AP-GfK_Poll_January_2015_Topline_marriage.pdf.

[29] Available at http://ap-gfkpoll.com/featured/findings-from-our-latest-poll-13.

not rule that same-sex marriage must be legal nationwide," with 48% in favor and 48% opposed to such a ruling. The AP-GfK Poll, at 4.

The Relationships in America survey conducted in February 2014 by GfK for the Austin Institute for the Study of Family and Culture, a very large-sized sample of 15,738 American adults between the ages of 18 and 60, found that 42% of those surveyed said it should be legal for gays and lesbians to be married in America, 31% expressed opposition, while 29% neither agreed nor disagreed. Austin Institute, "Relationships in America Survey" 50 (2014).[30] Since the sample for this survey excluded anyone over the age of 60, a demographic that other surveys show opposes same-sex marriage by large percentages, it is reasonable to conclude that had this survey included all adults, support for same-sex marriage would have been even less.

4. Polls showing majority support for same-sex marriage are flawed.

To be sure, several national surveys have found majority support for same-sex marriage, but those polls typically suffer from one or more methodological problems.

As discussed above, the Gallup Survey of 1,028 adults conducted in May 2014 found that 55% of Americans believe that marriages between same-sex couples should be recognized by the law as valid with the same rights as traditional marriages, while 42% of Americans believe such marriages should not be

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[30] Available at http://relationshipsinamerica.com/.

recognized as valid with the same rights as traditional marriages. Justin McCarthy, "Same-Sex Marriage Support Reaches New High at 55%," Gallup (May 21, 2014).[31] As noted previously, this survey has two significant flaws. First, Gallup primes the same-sex marriage question by first asking if gay relationships between consenting adults should be legal. Second, the question wording includes a connection to "rights" which very likely biases responses.

In March 2015, NBC News in conjunction with the Wall Street Journal found in a poll of 1,000 American adults that 59% of those surveyed favor allowing gay and lesbian couples to enter into same-sex marriages, while 33% oppose gay and lesbian couples being able to enter into same-sex marriages. NBC News, "At 59% Support for Same-Sex Marriage Hits New High" (March 9, 2015).[32] However, a closer look at the numbers shows more division—38% strongly favor same-sex marriage, while 24% of American strongly oppose such marriages. A large portion of those who say they favor same-sex marriages—21%—report they only "somewhat" favor it while just 9% of opponents only "somewhat" oppose it. NBC News/Wall Street Journal Survey, Study #15110, p. 17 (March 2015).[33]

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[31] Available at http://www.gallup.com/poll/169640/sex-marriage-support-reaches-new-high.aspx.

[32] Available at http://www.nbcnews.com/politics/first-read/59-support-same-sex-marriage-hits-new-high-n320171.

[33] Available at http://newscms.nbcnews.com/sites/newscms/files/15110_nbc-wsj_march_poll_3-9-15_release.pdf.

Of interest, the survey found that 62% of Republicans say they strongly view themselves as "a supporter of the traditional definition of marriage as being between one man and one woman," second only to those who strongly view themselves as a supporter of the goals of the National Rifle Association and other gun rights groups. On the Democratic side, only 56% say that they strongly view themselves as a supporter of the gay rights movement, far less than those who strongly view themselves as a supporter of civil liberties (73%), and less than those who strongly consider themselves as an environmentalist (60%) and a pro-choice position on abortion (57%). *Id.*, at 20. Taking all this into account, while the topline number shows majority support for same-sex marriage, this support is soft and nuanced.

The high water mark for purported support for same-sex marriage is the result of the CNN/ORC poll of 1,027 adults released in February 2015 purportedly showing that 63% of Americans believe that gays and lesbians have a constitutional right to get married and have their marriage recognized as legal, while 36% of respondents believe gays and lesbians do not have a constitutional right to get married and have those marriages recognized as legal. PollingReport.com, "CNN/ORC Poll, Feb. 12-15, 2015" (Feb. 2015).[34] These results are dubious. First, the results of the survey suggest that only 1% of Americans have no opinion on this question, an impossibly low figure and well below what other surveys have found. Second, the full results of the poll have not been publicly

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[34] Available at http://www.pollingreport.com/civil.htm.

released, making assessment of the survey impossible. The question on same-sex marriage is question number 41 in the survey. No question was released between question number 6 and question number 41, prohibiting assessment of the context of the same-sex marriage question, including determining whether the pollster "primed" the marriage question.

C. Public Perception Has Been Shaped By Biased Media Reporting.

It is understandable that many people believe that public opinion has shifted in support of same-sex marriage, because the media heavily promotes such a perception and gives scant coverage to any polls that show people continuing to support traditional marriage or to polls showing mixed public opinion. The extent of this media bias in the run-up to this Court's decisions in *Hollingsworth v Perry*, 133 S.Ct. 2652 (2014), and *Windsor* was documented by the Pew Research Center on Journalism and Media. Pew researchers examined 500 news stories published between March 18 and May 12 and reported that "stories with more statements supporting same-sex marriage outweighed those with more statements opposing it by a margin of roughly 5-to-1." Paul Hitlin, *et al.*, "News Coverage Conveys Strong Momentum for Same-Sex Marriage," Pew Research Center (June 17, 2013);[35] *see also* Taylor Colwell, "New Study Finds

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[35] Available at http://www.journalism.org/2013/06/17/news-coverage-conveys-strong-momentum/.

Media Bias in Gay Marriage Coverage," Townhall.com (June 17, 2013).[36]

Amici are aware of no reason why such media bias would have abated since this Court's rulings in *Hollingsworth* and *Windsor*. If anything, the bias likely has increased—as many in the media appear to believe their reporting on public perceptions of same-sex marriage has the potential to influence this Court's decisions on the issue.

III. The Constitution Does Not Authorize This Court to Accede to Petitioners' Request that it Overrule Existing Precedent and the Considered Policy Judgments of the States.

Having failed in their efforts to redefine marriage through the democratic process and to change the policy judgments of their fellow citizens by persuasion, petitioners and their supporters seek to have this Court dramatically change both the definition and the purpose of marriage by judicial decree. They claim that for the States to decline to redefine the institution of marriage so that it encompasses same-sex couples is a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The court below rightly rejected that argument, but the conflicting judgments of the Fourth, Seventh, Ninth, and Tenth Circuits (as well as those of numerous federal district courts) accepting those claims not only fail to respect fundamental policy choices made by the democratic process in the States, *cf. Schuette*, 134

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[36] Available at http://townhall.com/tipsheet/taylorcolwell/2013/06/17/new-study-finds-media-bias-in-gay-marriage-coverage-n1621835.

S.Ct., at 1637 (Kennedy, J., plurality opinion), *id.* at 1650 (Breyer, J., concurring opinion), but contravene established precedent of this Court. This Court should reject Petitioners' request for a judicial override of the democratic process, and reaffirm its decision in *Baker v. Nelson*.

A. This Court Has Never Recognized that the Right to Redefine Marriage to Encompass Same-Sex Relationships is Fundamental, And Has Cautioned Against the Judicial Creation of New "Fundamental" Rights.

Contrary to the decision below, the Courts of Appeals for the Fourth and Tenth Circuits have held that state man-woman marriage laws violate the substantive guarantees of the Due Process Clause. *Bostic*, 760 F.3d, at 384; *Kitchen*, 755 F.3d, at 1229-30. But they reached those decisions only after concluding that the right to marry as long recognized by this Court could be redefined to encompass same-sex relationships that, admittedly, formed no part of the history and traditions that gave rise to this Court's treatment of marriage as a fundamental right. *Bostic*, 760 F.3d, at 376; *Kitchen*, 755 F.3d, at 1209. Indeed, although those courts declined to follow it, this Court's decision in *Baker v. Nelson*, issued a few years after this Court firmly established the right to marry as a fundamental right in *Loving v. Virginia*, necessarily rejected the claim accepted by the Fourth and Tenth Circuits.

This is no mere semantic distinction that evolutionary processes have moved beyond. Rather, in *Loving*, this Court recognized that "Marriage is one of the 'basic civil rights of man,'" because it is "fundamental

to our very existence and survival." *Loving*, 388 U.S., at 12 (citing *Skinner*, 316 U.S., at 541). Absent the unique procreative ability of a man-woman union, it is hard to sustain the claim that other adult relationships are similarly "fundamental to our very existence and survival." The claim at issue here is thus not a simple extension of a right already recognized. It is, rather, an entirely new right, aimed at a different purpose altogether.

The constitutional analysis that governs, therefore, is this Court's decision in *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997), not *Loving v. Virginia*. And in *Glucksberg*, this Court made clear that, in order to prevent the Due Process Clause from being "subtly transformed into the policy preferences of the Members of this Court," the substantive due process analysis has two limiting features. *Glucksberg*, 521 U.S., at 720. First, the claimed fundamental right must be, "objectively, 'deeply rooted in this Nation's history and tradition.'" *Id.*, 521 U.S., at 720-21 (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977), and *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)). Second, that determination requires "a 'careful description' of the asserted fundamental liberty interest." *Id.* (quoting, *e.g.*, *Reno v. Flores*, 507 U.S. 292, 302 (1993)). These are "crucial 'guideposts for responsible decisionmaking ... that direct and restrain [the judiciary's] exposition of the Due Process Clause." *Id.* (quoting *Collins v. City of Harker Heights, Tx.*, 503 U.S. 115, 125 (1992)).

In asking that the "marriage" to someone of the same sex be treated as the same right to marry someone of the opposite sex that has long been recognized as fundamental in our nation's history and traditions,

Petitioners (and the several lower courts that have accepted such claims) fail to give a "careful description" of the right asserted, as required by *Glucksberg*. Had they done so, there would be no dispute about the outcome, for it is perfectly clear that the right to "marry" someone of the same-sex was not envisioned when the Fourteenth Amendment was drafted and ratified in 1868, was not recognized by this Court when the issue was first presented a century later, and is not part of our nation's "history and traditions." Fundamental rights under the analysis required by this Court in *Glucksberg* do not simply materialize from the Hollywood set of *Will and Grace* or because a President has "evolved" on this issue. Were it otherwise, the result would not be a "subtle" transfer of policy-making authority from the people to the court, but a broadside against democratic self-governance. This Court has never taken such a step, and in fact declined to do so when first asked forty years ago. It should not do so now.

B. Equal Protection Analysis Is Only Triggered If People Who Are "Similarly Situated" Are Treated Differently.

Petitioners have also asserted (and the Ninth and Tenth Circuits have agreed, contrary to the decision of the Sixth Circuit below) that man-woman marriage laws violate the Equal Protection Clause because the classification inherent in the one-man/one-woman definition of marriage impinged on a fundamental right by failing to afford same-sex couples the same

right to marry has is enjoyed by heterosexual couples. *Latta*, 771 F.3d, at 464; *Kitchen*, 755 F.3d, at 1218.[37]

Yet, as this Court has frequently recognized, "[t]he Equal Protection Clause ... is essentially a direction that all persons *similarly situated* should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (emphasis added). "The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Plyler v. Doe*, 457 U.S. 202, 216 (1982).

Accordingly, the issue is whether same-sex and opposite-sex relationships are similarly situated. This is a "threshold" inquiry, for the Equal Protection clause

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[37] The Seventh Circuit could not even fathom a rational basis for man-woman marriage laws, holding that "discrimination against same-sex couples is irrational, and therefore unconstitutional even if the discrimination is not subjected to heightened scrutiny ...." *Baskin*, 766 F.3d, at 656. The author of that opinion should perhaps have consulted his own, earlier writing on the subject, in which he rejected arguments for a constitutional right to same-sex marriage, noting:

> A decision by the Supreme Court holding that the Constitution entitles people to marry others of the same sex would be far more radical than any of the decisions cited by Eskridge. Its moorings in text, precedent, public policy, and public opinion would be too tenuous to rally even minimum public support. It would be an unprecedented example of judicial immodesty. That well-worn epithet "usurpative" would finally fit.

Richard A. Posner, "Should There Be Homosexual Marriage? And If So, Who Should Decide?" 95 Mich. L. Rev. 1578, 1585 (1997).

is not even triggered if the relationships are not similarly situated. *See, e.g.*, *Keevan v. Smith*, 100 F.3d 644, 648 (8th Cir. 1996).

Moreover, the issue is not whether the relationships might be similarly situated in some respect, but whether they are similarly situated in ways relevant "to the purpose that the challenged laws purportedly intended to serve." *Cleburne*, 473 U.S. at 454 (Stevens, J., joined by Burger, C.J., concurring).

The lower courts that have accepted such claims have erroneously emphasized the ways in which same-sex and opposite-sex relationships *are* similarly situated rather than the ways they *are not* similarly situated. The Tenth Circuit, for example, noted that the "importance of marriage is based in great measure on 'personal aspects' including the 'expression[] of emotional support and public commitment," aspects of relationships that are shared by same-sex and opposite-sex couples alike. *Kitchen*, 755 F.3d, at 1212.

That was error of the first magnitude. If marriage was only about the relationships adults form among themselves, it might well violate Equal Protection not to recognize as marriage any adult relationship seeking the recognition. But marriage is and always has been about much more than the self-fulfillment of adult relationships. Because the institution of marriage is the principal manner in which society structures the critically important function of *procreation* as well as the rearing of children, it has long been recognized as "one of the cornerstones of our civilized society," *Meltzer*, 402 U.S. at 957 (Black, J., dissenting from denial of cert.), "fundamental to our very existence and survival," *Loving*, 388 U.S., at 12 (citing

Skinner, 316 U.S., at 541). Same-sex and opposite-sex couples are simply *not* similarly situated with respect to at least that fundamental purpose.

That is undoubtedly why experts offered by *Plaintiffs* in another recent marriage case have admitted that redefining marriage to include same-sex couples would profoundly alter the institution of marriage. Trial Tr. at 268, *Perry v. Schwarzenegger*, 704 F.Supp.2d 921 (N.D. Cal. 2010) (testimony of Harvard Professor Nancy Cott). And why Yale Law Professor William Eskridge, a leading advocate for same-sex marriage, has noted that "enlarging the concept to embrace same-sex couples would necessarily transform [the institution of marriage] into something new." William N. Eskridge, Jr. & Darren R. Spedale, GAY MARRIAGE: FOR BETTER OR FOR WORSE? WHAT WE'VE LEARNED FROM THE EVIDENCE 19 (2006). In short, "[s]ame-sex marriage is a breathtakingly subversive idea." E. J. Graff, "Retying the Knott," The Nation at 12 (June 24, 1996). If it ever "becomes legal, [the] venerable institution [of marriage] will ever after stand for sexual choice, for cutting the link between sex and diapers." *Id.*

If this Court overturns the ruling of the Sixth Circuit below and accepts Petitioners' constitutional challenges, the very definition and purpose of marriage will necessarily be altered. Redefining marriage to encompass same-sex relationships "will introduce an implicit revolt against the institution into its very heart." Ellen Willis, "Can Marriage Be Saved? A Forum," The Nation at 16-17 (June 24, 1996). Indeed, same-sex marriage is "the most recent development in the deinstitutionalization of marriage," the "weakening of the social norms that define people's behavior

in ... marriage." Andrew J. Cherlin, "The Deinstitutionalization of American Marriage," 66 J. Marriage & Fam. 848, 850 (2004).

C. Fundamentally, The Issue Here is Who Makes The Policy Judgment About the Purpose of Marriage, The People, or the Courts?

When the California Supreme Court considered the initial state constitutional challenge to California's Proposition 8, it recognized that "the principal issue before [it] concerns the scope of *the right of the people, under the provisions of the California Constitution, to change or alter the state Constitution itself* through the initiative process so as to incorporate such a limitation as an explicit section of the state Constitution." *Strauss v. Horton*, 207 P.3d 48, 60 (Cal. 2009) (emphasis in original). Because the *federal* Equal Protection analysis requires, as a threshold matter, an inquiry into the purpose served by a classification in order to ascertain whether different groups of people are similarly situated, a similar issue pertains here. What is the scope of the right of the people under the federal constitution to make basic policy judgments about the purposes served and to be served by society's fundamental institutions, when that definition of purpose will determine whether the groups on opposite sides of the resulting classification are "similarly situated"?

Recognizing that such policy judgments are quintessentially the stuff of the democratic political process, Justice Baxter criticized the California Supreme Court majority for engaging in "legal jujitsu" when it found in the California Constitution a mandate for

same-sex marriage, "abruptly forestall[ing] that process and substitute[ing], by judicial fiat, its own social policy views for those expressed by the People themselves." *In re Marriage Cases*, 183 P.3d, at 457-58 (Baxter, J., concurring and dissenting). The people of the State reacted swiftly in reaction, overturning the California Supreme Court's decision.

Petitioners are asking this Court to do exactly the same thing that the California Supreme Court did before being rebuffed by the people of California. By minimizing the importance of the historical connection between marriage and the unique procreative abilities of male/female unions, they ask this Court to substitute its views about that threshold policy judgment for those of the fifty million voters across the country who, in recently voting to reaffirm marriage as a union of one man and one woman, have necessarily determined that the historic purpose still matters. This Court should emphatically reject the invitation to engage in such "legal jujitsu" and to "abruptly forestall" the political "process and substitute, by judicial fiat, its own social policy views for those expressed by the People themselves." *Id.*.

CONCLUSION

The legal definition of marriage is one of the most hotly-contested issues facing the American people. Contrary to public perception, there is credible polling evidence (WPA Opinion Research and The Polling Company) to suggest that Americans continue to believe in marriage as the union of one man and one woman, a view consistent with the more than fifty million votes cast in dozens of state marriage amend-

ment contests. There is equally credible polling evidence (Rasmussen Reports, Pew Center and Rice University) suggesting that support for same-sex marriage may be eroding, and there is strong polling evidence to show that public opinion is divided (AP Gfk, Rasmussen Reports, and Relationships in America survey).

Taken together, *amici* submit that the most accurate statement of public opinion on the issue of the definition of marriage is that Americans have conflicting viewpoints on the issue. Neither side has "won" the debate, but one thing is clear: It is a debate that should be resolved by voters and legislators through the democratic process, not one that is truncated and its outcome mandated by this Court.

Indeed, an overwhelming majority of American voters are opposed to this Court deciding the issue for every state, and rightfully so. As Justice Kennedy noted in *Schuette* when addressing the similarly-charged issue of race-based admissions in higher education, "this case is about who may decide it. There is no authority in the Constitution of the United States or in this court's precedents for the judiciary to set aside [State] laws that commit this policy determination to the voters." *Schuette*, 134 S.Ct., at 1637 (Kennedy, J., plurality opinion).

The decision of the Sixth Circuit below, allowing this fundamental policy determination to remain with the voters, should be affirmed.

Respectfully submitted,

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